



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

File: [REDACTED] Office: Nebraska Service Center

Date: AUG 10 2000

IN RE: Petitioner:  
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

*John F. Carmon*  
Terrance M. O'Reilly, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The petitioner is a specialty auto repair and restoration business which seeks to employ the beneficiary permanently in the United States as a land-rover mechanic. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of December 4, 1995, the filing date of the visa petition.

On appeal, counsel provides a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is December 4, 1995. The beneficiary's salary as stated on the labor certification is \$15 per hour or \$31,200 annually.

The petitioner initially submitted his 1993-1997 Form 1040 U.S. Individual Income Tax Return. The 1997 return reflected adjusted gross income of \$1,250; taxable interest of \$3,441 and dividend income of \$7,099. Schedule C of the return reflected gross receipts of \$238,274; gross profit of \$96,662; depreciation of \$3,075; wages of \$48,457; and net loss of \$11,859. The 1996 return reflected adjusted gross income of \$29,731; taxable interest of \$3,514; and dividend income of \$6,285. Schedule C of the return reflected gross receipts of \$274,589; gross profit of \$128,366; depreciation of \$6,566; wages of \$42,301; and net profit of \$19,865. The 1995 return reflected adjusted gross income of \$12,452; taxable interest of \$3,261; and dividend income of \$5,916. Schedule C of the return reflected gross receipts of \$230,327; gross profit of \$106,838; depreciation of \$4,178; wages of \$43,775; and net profit of \$7,717. The 1994 return reflected adjusted gross income of \$2,522; taxable interest of \$3,120; and dividend income of \$5,286. Schedule C of the return reflected gross receipts of \$267,647; gross profit of \$162,067; depreciation of \$3,161; wages of \$79,440; and net profit of \$29,782. The 1993 return reflected adjusted gross income of -\$28,103; taxable interest of \$3,866; and dividend income of \$5,182. Schedule C of the return reflected gross receipts of \$273,957; gross profit of \$149,365; depreciation of \$6,907; wages of \$92,947; and net profit of \$5,519. This documentation was considered insufficient and the director requested additional evidence of the petitioner's ability to pay the proffered wage at the time of filing.

In response the petitioner submitted copies of registration and license certificates for the business in the state of [REDACTED] a copy of a business certificate for the original business dated May 3, 1977 in [REDACTED] 1998 Form W-2 Wage and Tax Statement and 1998 Form W-3 Transmittal of Wage and Tax Statements; 1992-1996 Forms W-2 and W-3; 1991-1998 Forms 941 Employer's Quarterly Federal Tax Return; the petitioner's real property ownership; trust income and ownership in trust property; stock ownership; and loan documents made available to the business. The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition and denied the petition accordingly.

The petitioner is a sole proprietorship, and the income and assets of the owner are properly considered in an assessment of the ability of the business to pay the wage offered.

A review of the record reveals that the petitioner has four accounts with the [REDACTED] Bank. The first account was opened in September of 1980. The vice president of the bank states that the

petitioner has numerous stock certificates valued at \$264,975 and mutual fund investments of \$64,950. The petitioner has provided evidence that he has owned the stocks since 1980. In 1995, the petitioner owned 20.299% of a trust for a total of \$65,728.162 and in 1996, he owned 22.989% for a total of \$74,438.382. By 1999, he owned 31.059% for a total of \$100,569.042.

After a review of the federal tax return and additional documentation, it is determined that the petitioner had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained.